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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 103

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 42–55) is reported at 231 F. 2d 110. The findings of fact, conclusions of law, and order of the Board (R. 34–37) are reported at 109 NLRB 447.

JURISDICTION

The decree of the court below (R. 61) was entered on March 13, 1956. The petition for a writ of certiorari was filed on May 23, 1956, and granted on October 8, 1956 (R. 62). 352 U. S. 818. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), appear in Appendix A, *infra*, pp. 38–39.

QUESTION PRESENTED

Where employers bargain jointly in a multi-employer association with a single union which represents the employees of all, and the union supports its bargaining demands by a strike against one employer in the group, are the other employers, threatened by successive and separate strikes against themselves, forbidden by the National Labor Relations Act to close their plants until the strike is terminated?

STATEMENT

A. THE BOARD'S FINDINGS OF FACT [1]

For a period of 13 years, the eight linen supply companies located in the cities of Buffalo, Niagara Falls, and Dunkirk, New York, have bargained as a group with respondent Union, which represents the truck drivers of all eight companies (R. 35, 17). This bargaining has been conducted on behalf of the companies by the Linen and Credit Exchange, an association of which the employers are members. Under the customary procedure, after the negotiation by the Exchange and the Union of contracts of uniform application to all the companies, each of the contracts is approved and signed by the member company named in the contract (*ibid.*).

In March, 1953, the Exchange and the Union began negotiations for a new collective agreement to

[1] The underlying facts were stipulated by the parties (R. 16–20).

replace the existing contract between them, which was to expire on April 30, 1953 (R. 35; 17–18). Meetings were held during the succeeding weeks. No agreement having been reached, the Union, on May 26, 1953, struck Frontier Linen Supply, one of the members of the Exchange (R. 35; 18). A picket line was established at Frontier's plant only, and the Union members continued to work at the remaining seven companies (R. 35; 18). On the day following the strike at Frontier, however, the nonstruck members of the Exchange laid off their employees and notified the Union that operations would not be resumed until the strike at Frontier was terminated (*ibid.*).[2]

During the following week, the Union and the Exchange continued to confer on the terms of a new contract, and the strike and shutdown remained in effect (R. 35–36; 18, 20). On June 3, 1956, agreement was reached and a new contract was executed which was uniformly applicable to all members of the Exchange, including Frontier (R. 36; 20). Thereupon, the strike was called off, the nonstruck employers recalled their employees to work, and all eight companies once again began normal operations (*ibid.*).

B. THE BOARD'S DECISION

Upon the foregoing facts, the Board, Member Murdock dissenting, found that the nonstruck employers

[2] The term "lockout" has been applied to denote such a temporary layoff of employees, as distinguished from a discharge or permanent severance of the employment relationship. It is in this sense that the term is used in this brief.

were not precluded by the Act from shutting down their operations during the strike against Frontier, and therefore dismissed the complaint which charged that they had committed an unfair labor practice in violation of Section 8 (a) (3) and (1) of the Act by thus laying off their employees (R. 36–37).[3] As a factual premise for its determination, the Board found that, in view of the established practice of negotiating contracts uniformly applicable to all members of the Exchange, the strike against Frontier was in support of demands which were common as to all eight companies, and thus "necessarily carried with it an implicit threat of future strike action against any or all of the other members of the [Exchange]" (R. 36). The tactic of waging separate and successive strikes against the several employer members of a multi-employer bargaining unit was considered by the Board to be an exertion of "economic pressure to atomize the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 36). The Board concluded that the Act did not forbid the employers, in order to defend their interests in the multi-employer bargaining unit against the devisive pressures engendered by the threat of successive strikes, "and in the absence of any independent evidence of antiunion motivation," to make a common defense to the strike against Frontier and

[3] Among other relief, the Union sought compensation for these employees during the period of the shutdown.

accordingly shut down their operations during the strike (R. 36–37).[4]

C. THE DECISION BELOW

The court below sustained the Board's finding that, in the circumstances, the strike against Frontier implied that successive strikes would be waged against the remaining members of the Exchange, but, with Judge Waterman dissenting, rejected the Board's conclusion that the nonstruck members of the Exchange acted lawfully when they laid off their employees (R. 44–60). Accordingly, the court below set aside the Board's order dismissing the complaint and remanded the case to the Board for further proceedings (R. 55).

The major premise of the majority opinion below is that by striking Frontier the Union had in effect exercised its legal "right to withdraw from the multi-employer unit" (R. 52). So viewing the effect of the strike, the court below thought controlling, not the special considerations relied on by the Board relating to the interests of the nonstruck employers in their practice of group bargaining, but rather "the basic

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[4] The Board expressly limited its decision in this case to lockouts affected by the special considerations relating to multi-employer bargaining units, as distinguished from the case of a lockout by a single employer who deals separately with a union. Thus, the Board stated that the question of whether, as a general proposition, "the employer lockout is the corollary of the employees' statutory right to strike * * * [was] unnecessary to pass upon" (R. 36). See, however, the Board's subsequent decision in *American Brake Shoe Co.*, 116 NLRB No. 107 (August 28, 1956), 38 LRRM 1330, upholding unfair labor practice charges against an employer in connection with a lockout where no multi-employer bargaining unit was involved.

principle that an employer who locks out its employees on a mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (R. 45).

In addition, the court below expressed its view that Congressional treatment of multi-employer bargaining did not warrant the "extreme lengths to which [the Board] now seeks to go in order to maintain the 'stability' of the unit" (R. 54). As stated by the court (53–55):

> Multi-employer bargaining has never received the express sanction of Congress. It would stretch the usual canons of interpretation unduly far to conclude that, in enacting the Taft-Hartley Act, Congress gave legislative approval to all the previous Board rulings concerning such bargaining.
>
> * * * * *
>
> We feel the Board's action in restricting employees in the exercise of rights which Congress has expressly protected, merely to effectuate a policy as to which Congress has, as yet, expressed no clear opinion, constitutes an abuse of the Board's legitimate authority under the act and a usurpation of the power of Congress. Neither the Board nor the courts may make so fundamental a change in the existing law as that which would result from the Board's decision. [Footnotes omitted.]

SUMMARY OF ARGUMENT

The court below, in holding that the Union's strike against Frontier constituted an exercise of its "right to withdraw from the multi-employer bargaining unit" (R. 52), misconceived the nature of the strike

tactic resorted to by the Union and thereby cast the question of the legality of the nonstruck employers' lockout in an inapplicable and misleading context. Both in fact and in theory, the strike against Frontier cannot be construed as a withdrawal from multi-employer bargaining. Thus, it is undisputed that the Union and the Exchange, which had been engaged in group bargaining with each other for the preceding thirteen years, continued unit-wide negotiations without interruption during the strike and eventually concluded a unit-wide agreement. Moreover, the purpose and theory of the so-called whipsawing technique which the Union initiated against Frontier was to obtain surrender by all employers in the unit to the common contract demands which continued to be sought in negotiations with the Exchange.

Accordingly, the question presented is not whether employers bargaining separately upon a breakdown of a multi-employer unit may impose lockouts in the face of a strike threat; rather, the question is whether employers who bargain as a group may, acting to preserve their group interests, treat the first of a threatened series of whipsawing strikes as a strike against all, and counter by ceasing operations until the strike is terminated.

A. It is the Board's view that the Act requires in this case an accommodation to be made of both the Union's right to strike in support of contract demands and the employers' recognized interests in preserving the unity of their group bargaining position. Cf. *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105; *Republic Aviation Corp.* v. *Na-*

tional Labor Relations Board, 324 U. S. 793; *National Labor Relations Board* v. *Mackay,* 304 U. S. 333. Upon a consideration of these competing factors, it is the Board's task to determine the "proper adjustment" to be made.

B. Group bargaining is often found advantageous by unions because it achieves standardization of wages and conditions of employment, it minimizes organizational expenses, and it affords protection against raiding activities by rival unions with respect to the employees of single employers in the unit. The overriding advantage gained by employers from bargaining as a group is an ability to present a single position backed by their united strength in bargaining negotiations. Experience has shown that a single employer, when bargaining with a union which represents both its employees and the employees of its competitors, cannot ordinarily withstand a series of whipsawing strikes, that is, successive strikes against each in turn to obtain uniform contract terms. By combining for purposes of collective bargaining, employers are enabled to avoid union exploitation of the lack of unity among themselves and to make a common defense, as in this case, against a strike which necessarily threatens the bargaining position of each. Because of these factors, the practice of multi-employer bargaining has become an established—and in many instances an essential—method by which negotiations are carried on in many thousands of industrial relationships. The practice has been successful in promoting industrial stability and fostering mature employer-union relations.

The Board has been vested with statutory authority, which it has regularly exercised under both the original and amended Act, to designate multi-employer bargaining units. All legislative attempts to restrict the practice of group bargaining have been defeated. Congress, in short, has recognized and accepted multi-employer bargaining as an established fact of industrial life. In these circumstances, it is plain that employers who engage in such bargaining have a lawful and important interest in maintaining the unity of their bargaining position, which from their point of view is indispensable to the continued practice of bargaining as a group. This interest, accordingly, must be accommodated by the Act where it conflicts with the exercise of similarly recognized rights of others.

C. Whipsawing strikes are a direct assault upon "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 36). By this tactic, unions seek to divide-and-conquer each employer in turn, the very result which employers seek to avoid by banding together for bargaining purposes. Whipsawing strikes also undermine the stabilizing effects which group bargaining has contributed to industrial relations, for stability results from the fixing of uniform contract terms, and that in turn requires all phases of the bargaining relationship to be carried on at the group level.

By ruling that the Act does not forbid a unit-wide shutdown by the non-struck employers as a defensive measure against whipsawing aimed at all employers in the unit, the Board has made a fair adjustment of

the opposing interests of the parties. The Board's decision thus preserves in multi-employer bargaining the balance in the relative strengths of the parties which the practice contemplates and is essential to its continuation. To do less would give the participating union an unfair advantage by permitting it to receive the benefits of the relationship while eliminating the advantages to employers for which they give up their independence of action when they agree to bargain as a group. At the same time, the Board's decision neither prohibits the right of unions to strike, nor permits an employer to discharge employees for supporting whipsawing strikes. In substance, the Board's determination realigns a union's risk in striking to coincide with the scope of the unit against which it seeks to enforce its demands.

ARGUMENT

IN THE EVENT OF A STRIKE AGAINST ONE EMPLOYER IN A MULTI-EMPLOYER BARGAINING UNIT, WHEN ACCOMPANIED BY A THREAT OF SUCCESSIVE STRIKES AGAINST THE OTHERS TO WIN COMMON CONTRACT DEMANDS, THE NATIONAL LABOR RELATIONS ACT DOES NOT FORBID THE NONSTRUCK EMPLOYERS TO SHUT DOWN OPERATIONS PENDING SETTLEMENT OF THE STRIKE.

INTRODUCTION

Under the National Labor Relations Act, the whipsawing tactics adopted by the Union—striking one employer in a multi-employer bargaining unit in support of contract demands covering the entire unit, and threatening successive strikes against the other members of the unit for the same purpose—constitutes a

permissible economic weapon under the Act.[5] In response to those tactics, the nonstruck members of the unit treated the strike against one member as a strike against all, and accordingly shut down operations pending settlement of the strike. It is the Board's position that such conduct does not constitute an unfair labor practice. In the Board's view, the nonstruck members of the unit were not required by the Act to wait for the Union to carry out its threat of successive strikes, one by one, until all had submitted.

The Board's position accords with the decisions of three Courts of Appeals.[6] In taking the contrary position, the court below stated that "Multi-employer bargaining has never received the express sanction of Congress" and that the Board is without authority to approve lockouts "in order to maintain the 'stability of the employer unit'" (R. 53–54). Although, as we show *infra*, pp. 20–33, the court incorrectly evaluated the recognition given in the Act to

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[5] *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 581, 582 (C. A. 7); Section 13 of the Act.

[6] *Leonard* v. *National Labor Relations Board*, 197 F. 2d 435, 205 F. 2d 355 (C. A. 9); *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 582 (C. A. 7); *National Labor Relations Board* v. *Continental Baking Co.*, 221 F. 2d 427, 431–432 (C. A. 8); *National Labor Relations Board* v. *Spalding Avery Lumber Co.*, 220 F. 2d 673, 675 (C. A. 8).

Prior to this case, a majority of the Board had interpreted the Act as precluding the nonstruck members of a multi-employer unit from imposing a lockout in the circumstances of this case. *Morand Bros. Beverage Co.*, 99 NLRB 1448; *Davis Furniture Co.*, 100 NLRB 1016. However, after further study of the problem in the light of the court decisions cited herein, the Board decided in this case that the contrary conclusion is more consistent with the applicable law and policy considerations.

the practice of multi-employer bargaining, we do not understand the court's observations in this respect to be basic to its decision. Instead, the decision appears to rest on the ground that the Union's piecemeal strike strategy constituted, as a matter of law, a withdrawal by the Union from the multi-employer bargaining unit. Thus, without any reference to supporting evidence, the court held that in striking Frontier, the Union merely exercised its "right to withdraw from the multi-employer unit" (R. 52); accordingly, the fact that the Union had bargained with the members of the Exchange as a group before the strike against Frontier could, on this analysis, furnish no justification for departing from what the court stated to be "the basic principle that an employer who locks out its employees on mere threat of, or in anticipation of, a strike is guilty of an unfair labor practice" (R. 45).[7]

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[7] As noted *supra*, note 4, the Board in the instant case reserved decision on the question whether lockouts are the employer's equivalent of the union's right to strike. Prior Board decisions have recognized that a suspension of operations by an individual employer is permissible in anticipation of a strike where the employer's action is prompted by a purpose to avoid exceptionally serious prospective economic loss or business disruption that a strike might bring about. See, *e. g.*, *Duluth Bottling Association*, 48 NLRB 1335; *Betts Cadillac Olds, Inc.*, 96 NLRB 268. Where, however, a lockout is prompted by a punitive or discriminatory purpose, the Board has found it to be violative of the Act. *Somerset Classics, Inc.*, 90 NLRB 1676, enforced 193 F. 2d 613 (C. A. 2); certiorari denied, 344 U. S. 816. More recently, the Board has held that an employer may not "avoid the normal consequences of a strike by anticipatory action which discriminates against employees because of their union activities or otherwise interferes with their rights under the Act." *American Brake Shoe Co.*, 116 NLRB, No. 107 (August 28, 1956), 38 LRRM 1330, 1335.

The court's analysis misconceives the nature of the strike tactic resorted to by the Union in this case and thereby casts the question of the legality of the non-struck employers' lockout in an inapplicable and misleading context. As a practical matter, the strike against Frontier cannot be construed as an effort to withdraw from the multi-employer unit, for the Union continued during the strike, as before, to negotiate with the Exchange for a unit-wide contract, and, indeed, eventually executed such a contract (*supra*, p. 3). These unit-wide negotiations followed a practice of thirteen years' duration, and nothing in the record suggests an intent on the part of the Union to depart from that practice. In short, the record makes plain, as observed in the dissenting opinion, that "the Union did not seek to withdraw from the unit" (R. 59, N. 7). On the contrary, the Union's strike against Frontier, as the Board found, was an integral part of a broader overall strategy directed against *all* employers in the unit. Whipsawing thus represents in this case an effort by the Union to retain the advantageous structure of the multi-employer unit (see *infra*, pp. 23–26) and simultaneously to undermine by a divide-and-conquer strategy the unity for which the members of the Exchange had combined in collective bargaining.[8]

[8] Accordingly, neither the correctness of Board rulings, with which the court below expresses disagreement, relating to the right of unions to terminate a multi-employer bargaining relationship, nor the authority of the Board to require unwilling unions to bargain with an employer association on the ground that it circumscribes the appropriate unit, may properly be regarded as issues in this case. The development of the Board's rulings as

Accordingly, the question presented is not whether employers who bargain separately upon a breakdown of a multi-employer unit may impose lockouts in the face of a strike threat,[9] but whether employers who bargain as a group may, acting together to preserve their group interests, treat the first of a threatened series of whipsawing strikes as a strike against all, and cease operations until the strike is terminated.[10] In the Board's view, the answer to this question turns on an evaluation and accommodation of the legitimate interests of the employers in preserving the unity of their bargaining position in the multi-employer unit, and those of the Union in engaging in piecemeal strikes to attain their objectives. We believe that the Board's decision, upholding the employers' right to shut down operations during a strike against one of them, represents a reasonable and proper adjustment of these competing interests.

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to these matters is discussed in the references cited in the opinion below (R. 49–50).

[9] Compare *Spalding Avery Lumber Company*, 103 NLRB 1516, enforcement denied, 220 F. 2d 673 (C. A. 8).

[10] The Board's inference of fact that the Union's strike against Frontier "carried with it an implicit threat of future strike action against any or all of the other members of the [Exchange]" (R. 36) was disputed by the Union in the court below. The court, however, held that the stipulated facts afforded ample basis for the inference drawn by the Board; accordingly, the Board's finding in this respect is not open to attack in this Court. *H. J. Heinz Company* v. *National Labor Relations Board*, 311 U. S. 514, 518; *I. A. M.* v. *National Labor Relations Board* 311 U. S. 72, 75; cf. *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503.

A. Under the Act, the legality of the shutdown in this case turns on a balancing of the legitimate interests of the employers against those of the Union

An employer's right to close his plant—or to discharge, transfer, or hire employees, or otherwise alter the tenure and conditions of their employment—is affected by the Act only insofar as its exercise impinges upon the employees' statutory right to organize and to engage in concerted activities. See *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1, 45–46. Thus, it is settled that an employer commits no violation of the Act by suspending operations for business reasons which do not concern employee activities protected by the Act.[11] On the other hand, it is equally settled that a lockout prompted, not by business considerations, but by a purpose to defeat employee organization or other protected activities, is violative of the Act.[12]

There may frequently arise under the Act, however, an ambivalent situation in which tenure of employment is affected but which cannot be explained in terms of the foregoing distinction. Concerted activities on the part of employees may themselves give rise to business problems which, from the employer's standpoint, make a temporary shutdown or other restrictive measure desirable. In these circumstances,

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[11] See, *e. g., National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 211 F. 2d 848 (C. A. 5); *National Labor Relations Board* v. *Goodyear Footwear Co.*, 186 F. 2d 913, 918 (C. A. 7); *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. 2d 1020, 1023 (C. A. 6).

[12] See, *e. g., National Labor Relations Board* v. *Wallick & Schwalm Co.*, 198 F. 2d 477 (C. A. 3); *National Labor Relations*

protective economic action by an employer, although attributable to his legitimate business interests and not anti-union bias, may well interfere with the protected employee conduct which created the business problem. It is apparent that these situations, involving legitimate interests of both employers and employees, cannot be resolved in a frame of reference which takes into account the rights of only the one to the exclusion of the other. Rather, as this Court has recently stated with respect to this kind of problem, "Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112. See also *Republic Aviation Corp.* v. *National Relations Board*, 324 U. S. 793, 797–798.

Application of the foregoing principle has established, for example, the propriety, on the one hand, of replacing economic strikers, even though such action may obviously tend to deter employees from exercising their statutory right to strike (*National Labor Relations Board* v. *Mackay*, 304 U. S. 333, 345), and the impropriety, on the other hand, of permanently discharging such strikers (*National Labor Relations Board* v. *Buzza-Cardozo*, 205 F. 2d 889, 890 (C. A. 9), certiorari denied, 346 U. S. 923; *Morand Bros.* v. *National Labor Relations Board*, 190 F. 2d 576, 583 (C. A. 7); *National Labor Relations Board* v. *United*

Board v. *Somerset Classics*, 193 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 816; *Olin Industries* v. *National Labor Relations Board*, 191 F. 2d 613 (C. A. 5), certiorari denied, 343 U. S. 919.

States Cold Storage Corp., 203 F. 2d 924, 927 (C. A. 5), certiorari denied, 346 U. S. 818). The same principle is also determinative in decisions which have established the limitations which employers may impose on organizational activities on company time and property. For example, employers may not abridge their employees' statutory right to organize by reason alone of the fact that it is exercised on employer premises. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 803. However, considerations of discipline, safety, and efficiency of operations, which must also be recognized as "essential elements" in a stable and mature industrial relationship, may properly warrant reasonable restrictions on such activities(*id.* at 98).[13] Similarly, the measures an employer may take in protection of his interests may also depend, where they have an inhibiting effect on organizational activities, on whether such activities are carried on by nonemployees, and whether the "inaccessibility of employees [outside the plant] makes ineffective the reasonable attempts by nonemployee [organizers] to communicate with them through the usual channels." *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112; cf. *National Labor Relations Board* v. *Stowe Spinning Co.*,

[13] See also *Boeing Airplane Co.* v. *National Labor Relations Board*, 217 F. 2d 369, 374–375 (C. A. 9); *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375 (C. A. 7); *Peyton Packing Co.*, 49 NLRB 828, 843.

336 U. S. 226. These are instances under the Act of the "common juristic situation * * * defined by Mr. Justice Holmes: 'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.'" *United States* v. *Rumely*, 345 U. S. 41, 43–44.

Applying the same principle, the Board has held that threatened strikes, as in this case, may be countered by lockouts where particular circumstances give special weight to the employers' competing interests. For example, the Board has ruled that a suspension of operations is permissible in anticipation of a scheduled strike where spoilage of materials would otherwise result (*Duluth Bottling Association*, 48 NLRB 1335, 1336, 1359–1360); that there may be a shutdown because of the difficulties of planning production in the face of prospective recurrent work stoppages (*International Shoe Co.*, 93 NLRB 907); and that a lockout may be imposed where, because of a union's refusal to promise sufficient advance notice of a threatened strike, new repair work could not be taken with assurance that it would be finished and returned to customers (*Betts Cadillac Olds, Inc.*, 96 NLRB 268).[14] In these cases, because of the special circumstances described, a temporary shutdown of operations was a reasonable and necessary step for the avoidance of unusual economic losses or operative

[14] See also *Associated General Contractors*, 105 NLRB 767.

problems beyond the ordinary loss of business or customers that may be incidental to any strike;[15] at the same time, the permitted shutdown did not abrogate the right to strike.

The instant case requires a similar "determination of the proper adjustment" between competing employer-employee rights and interests—a task which primarily "rests with the Board." *National Labor Relations Board* v. *Babcock & Wilcox Co., supra,* at 112. As already pointed out, the tactic of piecemeal strikes against employers in a multi-employer bargaining unit to win common objectives is a permissible economic weapon available to unions under the Act.[16] In countering these tactics by a unit-wide shutdown, the nonstruck employers in this case, as the Board found and the court below tacitly assumed, were not prompted by "anti-union motivation" but rather by a purpose to protect "the employer solidarity which is the fundamental aim of the multi-employer bargaining relationship" (R. 36). Accordingly, decision here turns first upon an evaluation, under relevant statutory criteria, of the interests of both the nonstruck employers and the Union, and then upon a proper balancing of these interests in order properly to accommodate each under the regulatory provisions of the Act.[17]

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[15] Compare *American Brake Shoe Co.*, 116 NLRB No. 107 (August 28, 1956), 38 LRRM 1330.

[16] *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 581, 582 (C. A. 7).

[17] For an informative discussion of the question presented by this case, see Koretz, *Legality of the Lockout*, 4 Syracuse L. Rev. 251, and the *Lockout Revisited*, 7 Syracuse L. Rev. 263. See also

B. As parties to a multi-employer bargaining unit, the nonstruck employers possessed a legitimate interest, recognized by the Act, in maintaining the unity of their bargaining position

1. The practice of bargaining between an employer group and the union representing the employees of each member of the group has become a fixed and accepted practice in many industries. To upset the premises upon which it has developed and operates would be to disrupt the basis of union-employer relationships in a significant portion of American industry. Thus, the unit in which the Exchange and the Union had bargained for thirteen years is but one of an estimated 5000 to 6000 such metropolitan-wide bargaining units throughout the country.[18] A recent study of major collective bargaining agreements covering approximately 9 million workers shows that "About a third of the agreements, covering over two-fifths of the workers [nearly 4 million employees], were negotiated by multi-employer groups."[19] The growth of this practice did not, of course, take place overnight; indeed, group bargain-

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Note, 20 U. Chi. L. Rev. 299; Jones, *the National Labor Relations Board and the Multi-employer Unit*, 5 Labor Law Journal (C. C. H., Jan., 1954), p. 34.

[18] Monthly Labor Review, vol. 64, pp. 397, 409 (Bureau of Labor Statistics, 1947); Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conf. on Labor, N. Y. U., 1949), p. 39.

[19] Monthly Labor Review, vol. 79, p. 805 (Bureau of Labor Statistics, July, 1956).

ing has its origins in the latter part of the nineteenth century, and has since advanced steadily to this day.[20]

In some instances, bargaining on the basis of employer groupings is regarded as the only practical way in which any bargaining can be carried on. In its report on the West Coast Maritime Industry, for example, the Joint Committee on Labor-Management Relations observed that multi-employer bargaining "appears to have been both a necessity and a logical development from the practical economic factors governing [that] industry."[21] Similarly, the prevalence of large numbers of competing employers within the same geographical area, each with relatively few employees represented by the same local union, as in this case, often makes independent negotiations and contracts impractical, if not impossible.[22] More gen-

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[20] Monthly Labor Review, vol. 64, p. 397 (Bureau of Labor Statistics, 1947); Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 197. See also Barnett, *National and District Systems of Collective Bargaining in the United States*, Quarterly Journal of Economics, XXVI, May, 1912.

[21] This Committee was established by Section 401 of the Labor-Management Relations Act of 1947 and was directed to study and report, *inter alia*, on "the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industrywide or regional bargaining upon the national economy." Section 402 (6). The report on the West Coast Maritime Industry was the only study published by the Committee relating to multi-employer bargaining.

[22] In a study of collective bargaining practices in the trucking industry, it was pointed out that in the New York area alone there are approximately 4,600 employers employing some 52,000 truck drivers, and observed that "If employers really want any representation in collective bargaining, they have to get that participation through some group * * * it isn't a question of this or that type of bargaining—but it is merely a question of multi-employer

erally, however, multi-employer bargaining has grown simply because parties engaged in separate negotiations have become convinced that it offers a more satisfactory method for dealing with one another. Variance in the circumstances of the industries involved has led to like variety in the geographical extent of the groupings, the formality of the employer organizations upon which the bargaining unit is based, and the range of subject matter covered in the contracts.[23] However, both in terms of frequency and number of employees involved, clearly the most important type of multi-employer bargaining is practiced, as in this case, between a group of competing employers within a local metropolitan area and the union which represents their employees.[24]

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bargaining or no bargaining at all." Kaplan, *Negotiating Problems of the Trucking Industry* (Conference on Industry-Wide Bargaining, Univ. of Pa., 1948), p. 87. See also Feinsinger, *Collective Bargaining in the Trucking Industry* (Industry-Wide Collective Bargaining Series, Univ. of Pa., 1949), pp. 31–38. Over 80 percent of the employees in the trucking industry are covered by multi-employer bargaining agreements. *Collective Bargaining Structures: The Employer Bargaining Unit*, B. L. S. Report No. 1 (Bureau of Labor Statistics, 1953), p. 8. See also the testimony of A. G. Roth, President of the National Federation of American Shipping, before the Senate Labor Committee. Hearings on Amendments to the National Labor Relations Act, S. Comm. on Labor and Public Welfare, 80th Cong., 1st Sess., p. 623.

[23] See Chamberlain, Collective Bargaining (McGraw-Hill, 1951), pp. 165–170; Monthly Labor Review, vol. 64, p. 397 (March, 1947).

[24] *Collective Bargaining Structures: The Employer Bargaining Unit*, BLS Report No. 1 (Bureau of Labor Statistics, 1953), p. 1; Monthly Labor Review, vol. 64, p. 397; Bachman, *Multi-Employer Bargaining* (N. Y. Uni. Institute of Labor Relations and Social Security, 1951), pp. 8, 56–57; Pierson, *Multi-Employer Bargaining, Nature and Scope* (U. of Pa. Press, 1948), p. 39.

The use of group bargaining provides advantages to unions and employers alike. Thus, small employers may decide to band together to defend against being left with no choice but to accept pattern-setting contracts—that is, agreements by a large employer in the industry which they had no voice in negotiating, but which they are under economic pressure to adopt.[25] Unions, on the other hand, frequently urge group bargaining because they are thereby assured of standardization of wages for the employees they represent, a traditional trade union objective.[26] Similarly, a union's organizational expenses are likely to be minimized where it may gain representation rights by obtaining the support of a majority of the employees throughout a multi-employer unit rather than a majority of those who work for each employer; by the same token, the union gains security against raiding by outside organizations.[27] Operating to the advantage of both unions and employers are such considerations as the convenience of having but one set of

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[25] Lester, *Reflections on the 'Labor Monopoly' Issue* (Dept. of American Studies, Amherst College, 1950), p. 40; Taylor, *Public Interest in Establishment of Standard Employment Terms* (Conference on Industry-Wide Collective Bargaining, Uni. of Pa., 1948), p. 20.

[26] See, *e. g.*, Kerr and Randall, *Mupltiple Employer Bargaining in the Pacific Coast Pulp and Paper Industry* (U. of Pa., 1948), p. 10; Kerr and Fisher, *Multiple Employer Bargaining: The San Francisco Experience* (U. of Calif., 1948), p. 40; Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conference on Labor, N. Y. U., 1949), pp. 29, 43–44.

[27] See authorities cited in n. 26, *supra*. See also Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 184–185; Committee Print, 82d Cong., 1st Sess., *Factors In Successful Collective Bargaining*, p. 30.

negotiations to prepare for and one contract to administer. Participation in group bargaining also makes available greater resources to aid in fact-finding, research, and other aids to negotiation, and frequently tends to enhance responsibility in bargaining.[28]

The significance of these factors, although important, is nonetheless overshadowed by the importance of still another consideration—the inability of a single employer bargaining for himself, where the employees of a number of small competing employers are represented by the same union, to cope with the threat of whipsawing strikes. Thus, absent a multi-employer unit, experience has demonstrated that ordinarily small employers, such as those in this case, simply do not possess any measure of equality of bargaining strength with a union speaking for all of their employees. The weakness in the employers' position, in such a case, has been pointedly stated in a description of the circumstances which led to the organization of an employer association in San Francisco for the purpose of carrying on multi-employer bargaining.[29]

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[28] Williamson and Harris, *Trends in Collective Bargaining, A Summary of Recent Experience* (Twentieth Century Fund, 1945) pp. 233–234; Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 184–185; Garrett and Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (Uni. of Pa., 1949), pp. 2–3. See also Kerr and Fisher, and Kerr and Randall, cited in n. 26, *supra*.

[29] Bahrs, *The San Francisco Employer's Council* (Industry-Wide Collective Bargaining Series, Univ. of Pa., 1948), pp. 18–19.

> Under such circumstances the unorganized employer has no bargaining strength whatever when he acts alone. The union submits its demands. If the lone employer does not accede he is closed by a strike. The union diverts his employees to other jobs. If this cannot be accomplished a small strike assessment on those continuing at work can finance the strikers indefinitely. The employer's competitors get his business. Striking employees are at work elsewhere. The employer is soon the forgotten man. He has two choices—to submit to the demands or to go out of business.

Successive utilization of these tactics against all employers converts industrial relations into a pattern of piecemeal strife designed to bring one employer after another into line with the most favorable conditions exacted by the union from any one employer.[30]

Organization into associations for the purpose of taking a unified bargaining position has afforded such employers, when caught in this situation, a means of effectively defending against such union tactics. By negotiating as a group and presenting a common front on bargaining issues, employers are better able to obtain uniform provisions with respect to wages and conditions of employment, and thus prevent union

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[30] It has been observed that the process described above may operate in reverse in a depressive market situation or where a union is weak and cannot afford to strike. Thus, one of a group of competing employers may cut wages below the prevailing rate, thus forcing the others to do likewise or suffer a competitive disadvantage. See Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 172–174; Williamson & Harris, *Trends in Collective Bargaining, A Summary of Recent Experience* (Twentieth Century Fund, 1945), p. 233.

exploitation of differences among them. And where the union determines to initiate whipsawing strikes in support of its demands, the employers are in a position, as in this case, to take common action to preserve the unity which is the purpose of bargaining as a group. The equality of strength between the parties essential to successful bargaining is thus restored.[31] In short, the evolution and practice of group bargaining among competing employers whose employees are represented by a single union may be explained in substantial measure in terms of an effort by the employers to standardize employment conditions in their plants and to avoid the divisive and harmful effects of whipsawing.[32]

As might be inferred from the foregoing, experience has shown that multi-employer bargaining is not uni-

[31] See *American Communications Association* v. *Douds*, 339 U. S. 382, 401.

[32] See, *e. g.*, Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* (Univ. of Pa., 1948), pp. 4–5; Garrett and Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (Univ. of Pa., 1949), pp. 2–3; Kerr and Fisher, *Multiple Employer Bargaining: The San Francisco Experience* (Univ. of Calif., 1948), pp. 27–30; Hall, *Impact of the Bargaining Unit on Labor Management Relations* (Second Annual Conference on Labor, N. Y. U., 1949), pp. 29, 39–40; Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), p. 172; Climer, *Management Experience in the Rubber Industry* (Conference on Industry-Wide Collective Bargaining, Univ. of Pa., 1948), p. 5; Wolman, *Industry-Wide Bargaining* (Foundation for Economic Education, 1948), p. 41; Witte, *Economic Aspects of Industry-Wide Collective Bargaining* (Dept. of American Studies, Amherst College, 1950). Note also the statement of the Court of Appeals for the Ninth Circuit: "Congress, in permitting small employers to strengthen their positions by joining multi-employer associations, undoubtedly had in mind the power of large unions to coerce these less financially able small employers." *Leonard* v. *National Labor Relations Board*, 197 F. 2d 435.

versally adaptable to all bargaining relationships. It has been experimented with on some occasions, and then abandoned, and has been utilized scarcely at all in some industries.[33] It predominates, however, in many industries characterized, as the business involved in this case, by numerous small employers.[34] Where the practice has become accepted, available evidence indicates that the result has been a facilitation of the bargaining process and an aid to the maintenance of industrial peace.

Thus, group bargaining in these instances holds not only the advantages to the participants which have been described (pp. 23–24, *supra*) but also serves the public interest as measured in terms of the Act's declared policy of promoting industrial stability and peace. Strikes have tended to be infrequent within these units; stability of the industrial relationship has been a marked characteristic of multi-employer bargaining.[35] It has also been observed that under multi-employer bargaining "wage decisions are likely to be more sensible and far sighted, taking into consideration the economic interests of the industry as a

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[33] Monthly Labor Review, vol. 79, p. 807, Table 3 (July, 1956); *Collective Bargaining Structures: The Employer Bargaining Unit*, BLS Report No. 1 (Bureau of Labor Statistics, 1953), p. 8; Climer, *Management Experience in the Rubber Industry* (Univ. of Pa., 1948), p. 5; Chamberlain, *Collective Bargaining* (McGraw-Hill, 1951), pp. 186–190.

[34] See authorities cited in n. 24, *supra*.

[35] Monthly Labor Review, vol. 64, p. 397 (Bureau of Labor Statistics, 1947); Zorn, *Multi-Plant and Multi-Employer Bargaining* (Sixth Annual Conference on Labor, N. Y. U., 1953), p. 385, 401; *Causes of Industrial Peace, Final Report* (National Planning Association, 1953), pp. 11, 18; Kerr and Fisher, *Multiple*

whole,"[36] and that such bargaining "often promoted the introduction of labor saving devices in a sane 'staggered' manner to cushion, or entirely offset, injurious social consequences of mass layoffs and discharges."[37] These are characteristics of a mature bargaining relationship—a relationship in which employers fully accept the unionization of their employees, and in which unions genuinely seek a resolution of differences through negotiation rather than on the picket line.

2. The practice of group bargaining as we have described it has always enjoyed a solid legal basis in the provisions of the Act. Under the Wagner Act, the Board's "broad discretion to determine appropriate [bargaining] units" (*Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485, 491) encompassed authority to designate units coextensive with employer associations. *National Labor Relations Board* v. *Lund,* 103 F. 2d 815, 819 (C. A. 8); *Shipowners' Association of the Pacific Coast,* 7 NLRB 1002, 1024–1025. Accordingly, from the early days in the administration of the Wagner Act, the

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Employer Bargaining: The San Francisco Experience (Institute of Industrial Relations, Univ. of Calif., 1948), p. 53; Kerr and Randall, *Multiple Employer Bargaining in the Pacific Coast Pulp and Paper Industry* (Institute of Industrial Relations, Univ. of Pa., 1948), pp. 27–31; Witte, *Economic Aspects of Industry-Wide Collective Bargaining* (Department of American Studies, Amherst College, 1950), pp. 50–51.

[36] Lester and Robie, *Wages Under National and Regional Collective Bargaining: Experience in Seven Industries* (Department of American Studies, Amherst College, 1950), p. 93.

[37] Williamson and Harris, *Trends in Collective Bargaining, A Summary of Recent Experience* (Twentieth Century Fund, 1945), p. 233.

Board designated such units where they would best "insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise * * * effectuate the policies of [the] Act." Section 9 (b) of the Wagner Act.[38] Much of the impressive growth of group bargaining, as thus sanctioned by the Board, occurred in the years immediately preceding the adoption of the 1947 amendments to the Act.[39]

Relevant portions of the legislative history of the 1947 amendments to the Act make clear, as the court below concedes, "that Congress, in enacting the Taft-Hartley Act, did not intend to interfere with the then established practice of multi-employer bargaining" (R. 54, n. 13). The merits of this practice, as a matter of fact, were debated more extensively both in committee hearings and on the floor of Congress than perhaps any other single topic.[40] In the main, controversy ranged over whether the advantages of group bargaining in terms of industrial stability were outweighed by an adverse effect on free competition

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[38] The first such designation was in *Shipowners' Association of the Pacific Coast*, 7 NLRB 1002. For subsequent cases, see the Fourth, Fifth, Sixth, and Seventh Annual Reports of the Board, pp. 93, 69, 68–69, and 61–62, respectively (Gov't Printing Office).

[39] Monthly Labor Review, vol. 64, pp. 397, 406–407, 410.

[40] See, *e. g.*, Hearings on Amendments to the National Labor Relations Act, House Committee on Labor and Public Welfare, 80th Cong., 1st Sess. (1947), pp. 350–353, 548, 552–555, 585, 667, 1073, 1552, 1777–1780, 2187, 2214–2215, 2285, 2336, 3024; Hearings on Amendments to the National Labor Relations Act, Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. (1947), pp. 206–223, 256–258, 391–393, 427–428, 842–843, 1012–1017, 1162–1165, 1594, 2018–2019, 2311–2314, 2370–2371; 93 Cong. Rec., pp. 4030–4031, 4133–4134, 4442–4448, 4578–4587, 4675–4676.

which critics feared would result from establishing uniform wages and conditions of employment."[41]

The House bill contained provisions which would have prohibited industry-wide bargaining except, as here, where a group of small employers were located within the same geographical area. H. R. 3020, Section 2 (16), 9 (f) (1) and 12 (3) (a), 80th Cong., 1st Sess. See H. Rep. No. 245, 80th Cong., 1st Sess., pp. 8–9, 24, 35–36. On the other hand, the Senate bill, as reported, expressly recognized the right of the Board to certify multi-employer bargaining units where "such employers have voluntarily associated themselves together for the purposes of collective bargaining." S. 1126, Sec. 2 (2), 80th Cong., 1st Sess. Thereafter, an amendment to the Senate bill was proposed on the floor of the Senate which would have prevented certification of a union as bargaining representative of the employees of more than one employer, with an exception, similar to that in the House bill, relating to situations where such employees were "employed in the same metropolitan district or county by different employers"; the proposed amendment would also have allowed local unions which bargained in multi-employer units to withdraw from such units and make separate settlements with the employer whose employees it represented. 93 Cong. Rec. 4442. During the floor debate on this proposal, its proponents made explicitly clear that they understood the existing law to permit multi-employer bargaining even on a nation-wide scale, and that their

[41] See references cited in n. 40, *supra*.

amendment, although rendering a union representing employees of many widespread employers ineligible for Board certification, would not make such bargaining practices illegal, 93 Cong. Rec. 4030, 4443–4447, 4578, 4586, 4675. The proposal, however, was defeated (93 Cong. Rec. 4676), and the conference agreement which subsequently became law also eliminated the restrictions on multi-employer bargaining contained in the House bill (H. Cong. Rep. No. 510, 80th Cong., 1st Sess., pp. 46–47). The conference agreement in addition omitted the language in the Senate bill which recognized the Board's practice of certifying multi-employer units. This was done for the express reason that the language in question "merely restates the existing practice of the Board in the fixing of bargaining units containing employees of more than one employer, and it is not thought that the Board will *or ought* to change its practice in this respect." H. Cong. Rep. No. 510, 80th Cong., 1st Sess., p. 32 (emphasis added). In sum, all attempts to restrict multi-employer bargaining were defeated when the Act was amended in 1947, and Congress indicated its approval of the continuation of such bargaining, particularly in the situation (as in this case) where the employers are located in the same metropolitan area. Accordingly, in the years since 1947, the Board has continued to designate multi-employer units when shown to be appropriate.[42]

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[42] See, *e. g.*, 14th, 15th, and 16th Annual Reports of the Board (Gov't Printing Office), pp. 36–37, 47–48, and 102–104, respectively. See also *Associated Shoe Industries*, 81 NLRB 224, 228–229, 235, n. 28.

Congressional acceptance of group bargaining, moreover, is made all the more meaningful in the light of its long history which pre-dates the Wagner Act, the evidence of its successful operation in facilitating collective bargaining and promoting industrial stability, and the need for it in some industries if there is to be in any real sense bargaining at all (*supra*, pp. 20–28). Multi-employer bargaining is thus a clear instance of "the philosophy of bargaining as worked out in the labor movement in the United States" which the Act has absorbed and sanctioned. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 408, quoting from *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346.

The decision below would largely reject the foregoing considerations in determining whether the nonstruck employers in this case possessed a defensible interest in their common bargaining position. Because of the absence of Congressional attention to the precise problem of lockouts by employers in multi-employer units as a counter-measure to whipsawing strikes, the court below characterized the Board's decision as a "usurpation of the power of Congress" with respect to "a policy as to which Congress has, as yet, expressed no clear opinion" (R. 55). But, as Judge Waterman succinctly stated, "The Act is not a detailed blueprint, but a general guide; and it is the function of the Board to adjust the conflicting interests of employers and employees" (R. 59). This Court has never doubted the Board's power to make such adjustments where the exercise of employee rights conflicts with employer rights which may not

be ignored in administering the Act, even though their existence is implied rather than express. See cases cited pp. 16–17, *supra;* cf. *Phelps-Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194. It is, accordingly, enough for determination in this case that Congress has recognized and accepted multi-employer bargaining as an established fact of industrial life. This much we have shown. And from this showing it follows that employers in multi-employer bargaining relationships have a lawful and meaningful interest in maintaining the unity of their bargaining position which, from their point of view, is the overriding reason for, and an indispensable factor in, the group bargaining practice. No less than the interests preserved by the Act in keeping a business running, maintaining plant discipline, and excluding non-employees from employer property (*supra,* pp. 16–17), the interest of the employers in this case in the proper functioning of their bargaining unit must be accounted for under the Act when it conflicts with union activity.

C. The Board has made a fair and reasonable accommodation between the interests of the employers in maintaining the unity of their bargaining position within the unit and those of the Union in striking in support of contract demands

Nullifying the employers' right to defend against a whipsawing strike by means of a unit-wide shutdown not only forfeits their principal stake in multi-employer bargaining (see *supra,* pp. 24–26) but destroys as well the basis for the stabilizing effect which group bargaining has contributed to industrial re-

lations. The mutual responsibility that has attended group bargaining relationships is a concomitant of maintaining all phases of the relationship at the group level, including the fixing of uniform terms of employment for all. This can be accomplished only where there is relative equality of strength between the parties, *i. e.*, where the common program of the employees, presented on their behalf by their union and backed by their combined strength, may be met by a common position of the employers involved (*supra,* pp. 25–26).

Such an alignment of strengths simply reflects that which the Act plainly contemplates as essential to collective bargaining when it protects the right of the employees of a single employer to organize for purposes of dealing with him. Where employees of more than one employer are so organized to obtain common conditions of employment, then by the same token effective bargaining may well require that such employers pool their economic strength to preserve the equation in the relationship. "A negotiatory association is to the employer the nearest counterpart of what the union is to an employee."[43] Such a balance of forces enables both agreements and contests between the parties to be of unit-wide scope. As shown *supra,* pp. 27–28, the risk of resort to economic action thereby becomes more serious to both parties, and experience has proven that responsible negotiations tend to replace strikes as a means of resolving differences. Unless, however, whipsawing strikes can be opposed by the united action of employers in such

[43] Williamson and Harris, *Trends In Collective Bargaining* (1945), p. 26.

bargaining units, the equality of strength between the parties, and the purpose of achieving unit-wide agreement are subverted, and thereby the entire concept of multi-employer bargaining is aborted."[a]

We submit that the accommodation made by the Board—allowing a strike against a single employer in a multi-employer bargaining unit to be met by a unit-wide shutdown—is both fair and reasonable, and a permissible exercise of its statutory authority. The Board's ruling simply places the parties in the position which is contemplated by the underlying nature of multi-employer bargaining, preserving to each the advantages and disadvantages that the relationship presupposes. By contrast, the decision below, as noted in Judge Waterman's dissenting opinion, permits a union "to keep the benefit which it has derived from multi-employer bargaining, while at the same time nullifying the consideration that made such unit desirable from the employers' standpoint." As explained more fully by Judge Waterman (R. 58–59):

> That is to say that both sides gain certain benefits and accept certain restrictions when they agree to engage in multi-employer bargaining. The union gains important organizational, raiding and standardization advantages, while the employers gain a protection

[a] There is general agreement among the commentators on this score. See, *e. g.*, Note, 66 Harv. L. Rev. 886, 896; Note 20 U. of Chi. L. Rev., 299, 304; Note, 42 Va. L. Rev. 684, 686; Note, 43 Geo. L. J. 426, 428; Note, 50 NW. L. Rev. 240, 243–244. The opinion of the Ninth Circuit in *Leonard* v. *National Labor Relations Board*, 197 F. 2d 435, at 437, similarly states that, subjected to unrestricted whipsawing, the employers' "unit power of collective bargaining would be impaired and ultimately the organization itself destroyed."

> against whipsawing. [The decision of the majority] would deprive employers of this *quid pro quo*. The Union is enabled to strike the employers one at a time without running the deterrent risks of a unit-wide strike.[45]

This *quid pro quo*, it may be added, is of particular importance to small employers (see *supra*, pp. 21, 23) who are frequently dependent on group bargaining for any measure of bargaining power.

Of equal importance with giving fair recognition to employers' interests is the accommodation made by the Board's ruling of unions' right to strike. It bears emphasis that this important statutory right is preserved. Nor does the Board's decision in this case permit the employer members of a multi-employer unit to discharge employees who engage in whipsawing strikes, a penalty incommensurate with the protection of the employer interest in preserving the group bargaining unit. *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 190 F. 2d 576, 583 (C. A. 7). A temporary unit-wide lockout does no more than realign a union's risk in striking to coincide with the scope of the bargaining unit with respect to which it negotiates and attempts to enforce its demands. This much, as we have shown, is essential to the effectuation of the purpose of group bargain-

[45] The advantages to unions of bargaining in a multi-employer unit have been more fully discussed at pp. 23–24, *supra*. It may also be noted that, when employers agree to bargain in a multi-employer unit, the union is protected against the risk of being decertified or repudiated as the bargaining representative by employees on the basis of a single employer unit. Nonetheless, as pointed out in the text, immunization of a strike against a single employer in the unit from a unit-wide lockout eliminates the principal advantage to employers to engage in group bargaining.

ing. The relative equality of strength of the parties' positions is maintained at the level established by the bargaining unit. Thus, the Board's decision here implements the theory and practice of multi-employer bargaining by permitting employers to treat a strike against one of their number, a strike designed to enforce a demand against all, as a strike against all. See *Leonard* v. *National Labor Relations Board*, 205 F 2d 355, 357–358 (C. A. 9). And, on the other hand, the strike weapon is qualified only as to the scope of the shutdown it may entail, thereby preventing the strikers from acting "without regard to any duty which the existence of rights in others may place upon [them]." *Republic Aviation* v. *National Labor Relations Board*, 324 U. S. 793, 798.[46]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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DECEMBER, 1956.

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[46] See Koretz, *The Lockout Revisited*, 7 Syracuse L. Rev. 263, 268–271.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the

purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

U. S. GOVERNMENT PRINTING OFFICE: 1988